IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7 of 2001
with
CIVIL APPLICATION No. 3593 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURESHKUMAR DODIA

Versus

CHIEF OFFICER/PRESIDENT

Appearance:
MR PH PATHAK for Petitioners
MR PV HATHI for Respondent No.1
MR IM PANDYA, AGP for Respondent No.2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 04/05/2001

ORAL JUDGEMENT

1. A Draft amendment has been given by Shri P.H. Pathak, learned Counsel for the petitioner seeking certain amendments in the petition. The draft amendment is opposed by Shri P.V.Hathi, learned Counsel for the respondent. The prayer in the draft amendment is to declare that the Resolution dated 17.10.1988 applies to the employees of the respondent Nagarpalika and direct the respondents to extend the benefits of resolution dated 17.10.1988 to the petitioner employees.

Alternative amendment is sought that it may be declared that the decision of the respondent to exclude the employees of the Nagarpalika from extending the benefits of Resolution dated 17.10.1988 is ultravires the Articles 14 & 16 of the Constitution of India and to declare the Resolution dated 17.10.1988 to that extent as unconstitutional and direct the respondents to extend the benefits under Resolution dated 17.10.1988 to the employees of the Nagarpalika. Further amendment sought is to declare inaction on the part of the respondents extending the benefits as per the Resolution to the petitioner employees, as arbitrary, illegal, unjust and violative of Articles 14 & 16 of the Constitution of India and to direct the respondents to grant all consequential benefits of the Resolution dated 17.10.1988 with 18 % per annum interest. The draft amendment cannot be granted as of right. Only such amendments can be granted which are essential for adjudication of the real controversy between the parties. The purpose of this draft amendment is simply to delay the disposal of admission matter. Since the petitioners are claiming benefit under Resolution dated 17.10.1988 they cannot be permitted to challenge the vires of the said resolution. The draft amendment is, therefore, rejected.

2. Now I propose to dispose of the Civil Application No.3593 of 2001 in Special Civil Application No.7 of 2001.

3. Special Civil Application No.7 of 2001 has been taken up for admission first.

On 2.1.2001 notice was issued by the Court returnable on 10.1.2001. Interim order was granted in the following terms :

"Status-quo as on today regarding service condition of the employees whose names are mentioned in Annexure : A to the petition be maintained in the meanwhile."

It is for vacation of this interim order that Civil Application No.3593 of 2001 has been moved. Since the interim relief was already granted in the writ petition first of all Special Civil Application is to be taken for consideration on admission.

4. On the maintainability of Special Civil Application Shri P.V.Hathi, learned Counsel for the respondent has argued that the petition is not maintainable and he has raised certain preliminary objections. His first objection is that the petition is not maintainable and there is efficacious alternative

remedy available to the petitioners who can approach the Conciliation Officer of the State Government and then the Labour Court or Industrial Tribunal, as the case may be, under the Industrial Disputes Act. He has also raised preliminary objection that the reliefs calimed in this petition cannot be granted hence the petition cannot be admitted. He has relied upon several decisions of the Apex Court.

5. Another stand of Shri hathi has been that what is stated in Para : 3 of the Civil Application has been reiterated at the time of admission of Special Civil Application. It is averred in Para : 3 of the Civil Application that number of employees who were appointed in 1998, 1999 and 2000 are shown to have been appointed in the Statement Annexure : A, annexed to the petition as 4 to 5 years and have mislead the Court to pass ex-parte interim order as if they were such employees of the Municipality. In fact all the employees shown in Annexure : A are daily wagers appointed by the office bearers of the Municipality without following any procedure and are not on the regular establishment of the Municipality. It is also averred that the outgoing President whose term was due to expire, had appointed his sister Ranjanben Patel at Sr.No.19 and his brother Bharatbhai K. Ladola at Sr.No.27 of the Schedule on a fixed salary of Rs.3000/per month in June and April 2000 respectively. It is also averred that such appointments could not have been made by the President or by the General body as the power to create and sanction posts was with the Director of Municipalities under Section 50 of the Gujarat Panchayat Act. Still other employees were appointed in the month of December and June, 1998. It is also averred that such appointments were made without any sanctioned post or without there being any necessity hence the Administrator of the Municipality is required to set right the financial affairs of the Municipality and therefore it is necessary for him to pass necessary orders for retaining only those employees who are required for the purposes of running the administration. These are the disputed questions of fact inasmuch as Shri Pathak has not admitted what is averred in Para : 3 of the petition. These disputed questions of fact cannot be decided in a petition under Article 226 of the Constitution of India.

6. Let us now examine whether the reliefs claimed in the petition can be granted in exercise of jurisdiction under Article 226 of the Constitution of India. Relief : B is for a declaration that the respondent No.1 has adopted unfair labour practice, demanding the resignation

of the employees from the Union and to withdraw the demand at Annexure : A to the petition and direct the respondent No.1 to absorb the petitioner employees as permanent employees of the respondent Nagarpalika and grant them all the benefits of Resolution dated 17.10.1988 issued by the State Government. Shri P.V.Hathi has rightly contended that the Resolution No.WCE/1588/5/1/32 dated 17.10.1988 of R & B Department is not applicable to the Municipality. Shri Pathak for the petitioner, on the other hand, vehementally urged that this resolution is applicable to the Municipality as it is a policy decision of the Government and it is applicable to all the Government Departments including the Respondent Nagarpalika. I am unable to agree with this contention. It is applicable mainly to Roads & Building Departments and various other Departments of the State Government like Water Supply Department, Panchayat & Rural Housing Development Department and other Department for the purpose of repairing and maintainance of the Construction. It is thus clear that this Resolution has not been made applicable to the Municipality or the Nagarpalika. As such no benefit under this Resolution can prima facie be given to the employees of the Municipality. So far as declaration regarding respondent No.1 adopting unfair labour practice is concerned it has to be decided by the concerned Industrial Tribunal/Labour Court through the instrumentality provided under the Industrial Disputes Act and not in exercise of jurisdiction under Article 226 of the Constitution of India. No direction can be given by this Court in the nature of mandamus to the respondent to absorb the petitioners who were not appointed on the sanctioned post and who were illegally and irregularly appointed by the office bearers of the municipality who had no right to appoint them. Consequently relief : B cannot be granted as prayed for in this petition.

7. So far as Relief : A is concerned, part of this is repetition of Relief : B regarding declaration that the practice adopted by the respondent No.l to continue the petitioner employees as daily-wager for years to deprive them of the benefit of the status of permanent employees is unfair labour practice is covered by part of Relief : B for which the petitioner, if they so desire, can approach the Labour Court/Industrial Tribunal as provided under the Industrial Disputes Act by moving for conciliation and reference by the appropriate Government.

8. Likewise the claim of the petitioners is that they are entitled to the same benefits which are granted to permanent employees of the respondent Nagarpalika also

can not prima facie be granted in view of the Apex Court's decision in STATE OF HARYANA & ORS. v/s. JASMER SINGH & ORS., reported in JT 1996 (10) SC 876. The Apex Court in this case has held that "the respondents, who are employed on daily wages cannot be treated as on par with persons in regular service of the State of Haryana holding similar posts. Daily rated workers are not required to possess the qualifications prescribed for regular workers, not do they have to fulfil the requirement relating to age. They are not selected in the manner in which regular employees are selected. In other words the requirements for selection are not rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his being subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They can not, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay-scale of the regularly employed."

9. So far as question of regularisation is concerned the Apex Court in the case of SUBEDAR SINGH & ANR. v/s. DISTRICT JUDGE, Mirzapur & anr. reported in 2001 LAB.I.C. 64, observed that "Paid apprentices to ministerial establishment of Civil Courts not in consonance with statutory Rules even if continued for a long period are not entitled to be regularised." The Hon'ble Supreme Court in AHMEDABAD MUNICIPAL CORPORATION v/s. VIRENDRA KUMAR JAYANTIBHAI PATEL reported in AIR 1997 SC 3002 has observed that "if there is recruitment procedure and that procedure has not been followed, viz. vacancies were not advertised nor the candidate appeared before the Selection Committee nor any selection Committee was constituted for such appointment then the doctor who had been visiting Dental Clinic on daily fee basis for treating patients for a period of more than 1000 days and also appeared before the Selection Committee but was not selected can not get sympathy or equity in the matter of such appointment especially where the recruitment in service is governed by the statutory rules. Applying this verdict since the petitioners were not appointed in accordance with rules prima facie they are not entitled to any sympathy.

10. On the point of regularisation the Hon'ble Supreme Court in MADHYAMIK SIKSHA PARISHAD, UP, v/s. ANIL KUMAR MISHRA & ORS., reported in AIR 1994 SC 1638 observed that persons working under Education Board on adhoc assignment against post which is not sanctioned

cannot claim right of regularisation.

11. On the basis of these pronouncements the preliminary objection raised by Shri Hathi has to be accepted that this Court can not issue mandamus as sought for in Reliefs A & B to the petition.

12. Shri Pathak hasd relied upon several decisions in support of his contention that the petition is maintainable.

13. The case of G.P.PANT UNIVERSITY v/s. STATE OF UP, reported in 2000-II LLJ 277 has no application to the facts of the case, hence detailed discussions of case is not required.

14. The next case relied upon by Shri Pathak viz. GUJARAT AGRICULTURAL UNIVERSITY v/s. RATHOD LABHU BECHAR & ORS., reported in AIR 2001 SC 706 is also distinguishable firstly because it arose out of a reference made by the Government u/s.10 (c) of the Industrial Disputes Act. The petitioner Union has not availed of remedy under the Industrial Disputes Act. Moreover in this case earlier view of the Apex Court in State of of Haryana v/s. Jasmer Singh (supra) has not been denounced nor any contrary view has been taken.

15. The case of CHIEF CONSERVATOR OF FORESTS & ANR. V/s. JAGANNATH MARUTI KONDHARE & ORS., reported in (1996) 2 SCC 293 is also distinguishable on facts. In this case casual workmen were employed under the scheme with permanent basis undertaken by the Forest Department of the State Government and they worked for 100 to 300 days in each year. Consequently the Apex Court held that in such sircumstances the order of the Industrial Tribunal to make such workmen permanent with all consequential benefits can be upheld. In the case before me there is no prima facie material at this stage that persons mentioned in Annexure : A to the petition were employed in Municipality under such scheme. Consequently the said benefit cannot be given to these petitioners.

16. Shri Pathak has further contended that on identical facts several petitions were admitted by this Court and as such this petition should also be admitted. Reliance has been placed upon the Apex Court's verdict in the case of BIR BAJRANG KUMAR v/s. STATE OF BIHAR, reported in AIR 1987 SC 1345. However, Shri Pathak could not show me any identical case where petitions on similar facts were admitted. This Court at the admission stage is not required to call for records of other cases to

scrutinize whether the facts were identical or not.

17. For the reasons stated above, it is not necessary to consider at length at this stage whether alternative efficacious remedy under the Industrial Disputes Act is efficacious or not. Suffice it to say that the writ petition is not maintainable and the reliefs claimed for in this petition cannot be granted. Consequently the petition is dismissed at the admission stage.

18. Since the writ petition has been dismissed at the admission stage interim relief dated 2.1.2001 is hereby vacated.

19. Since interim relief is vacated Civil Application No.3593 of 2001 has become infructuous and is rejected as infructuous.

20. Shri Pathak, learned Counsel for the petitioners requests for continuance of interim relief for a period of two weeks. The interim relief for maintenance of status-quo, on the facts and circumstances of the case, cannot be extended. The request is declined.

sd/-

Date : May 04, 2001 (D. C. Srivastava, J.)

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